IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

MONDAY, THE 11TH JUNE 2007 / 21ST JYAISHTA 1929

CRL.A.No. 156 of 2007()

SC.46/2005 of ADDL. SESSIONS COURT (ADHOC)-II, KALPETTA

.....

APPELLANT:

GOPAN @ GOPAKUMAR,
C.NO. 3768,
CENTRAL JAIL, KANNUR

BY ADV. SRI.K.P.HARISH(STATE BRIEF)

RESPONDENT:

STATE OF KERALA,
REPRESENTED BY PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM

BY PUBLIC PROSECUTOR SRI.S.DILEEP

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 11/06/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.Thankappan, J.

- -

Crl. A. No. 156 of 2007

- -

Dated this the 11th day of June, 2007

JUDMENT

Accused in S.C.No.46/2005 on the file of the Court of the Addl. Sessions Judge (Adhoc) Court-II, Kalpetta is the appellant. He was charge-sheeted for the offences punishable under section 58 of the Abkari Act on the allegation that the appellant was found in possession 4 litres of country made arrack. The appellant was arrested on the same day, contraband article was seized, sample was collected and sealed and labelled in the presence of witnesses and the case was registered. To prove the allegation the prosecution examined PW1 to PW7 and Exts.P1 to P7 were marked. Material objects MO1 was also marked. When the appellant was questioned under section 313 of Cr.P.C., he denied the allegation levelled against him and stated that he was innocent and he was falsely implicated. Relying on the evidence adduced by the prosecution, the trial court found that the appellant was guilty of the offences punishable under sections 58 of the the Abkari Act and he was convicted thereunder and sentenced to undergo simple imprisonment for two years and also to pay a fine of

Rs.1,00,000/- and in default of payment of fine to undergo simple imprisonment for a further period of six months. The conviction and sentence awarded against the appellant are under challenge in this appeal.

2. The appeal is filed through the jail authorities. A member from the State Brief panel has been appointed to defend the case of the appellant.

3. This Court heard learned counsel for the appellant and the learned Public Prosecutor.

4. Learned counsel for the appellant contends that the court below went wrong in placing reliance on the official witnesses to find the appellant guilty, as PW3 and PW4, who are the independent witnesses examined to prove the case, were not supported the prosecution. It is also contended that PW1, the detecting officer, had not followed the procedure prescribed under the Act. It is further contended that the trial court went wrong in finding the appellant guilty under section 58 of the the Abkari Act. The learned counsel also contends that the sentence imposed against the appellant is excessive.

5. PW1 had stated that when himself and the party reached the scene of occurrence, they found the appellant was carrying a black can and on seeing the police party, he tried to ran away. He was restrained and opened the can and on examination it was revealed that the can contained 4 litres of arrack. PW1 also stated that he prepared an arrest memo and arrested the appellant, seized the article, collected the sample and sealed and labelled the same in the presence of witnesses. He stated that he had produced the seized articles in court on the next day itself with request to send the samples for chemical analysis. Ext.P6 chemical analysis report would show that the samples contained ethyl alcohol. PW2 Police Constable who accompanied PW1 had given evidence in support of PW1. Though PW3 and PW4 were examined as independent witness to prove the case, they were reluctant to support the prosecution. However, they admitted their signature in Ext.P2 seizure mahazar. PW5 and PW6 proved the scene mahazar. PW7 Sub Inspector who investigated the case filed the final charge. The trial court after considering the entire evidence found that the appellant was found in possession of four litres of arrack without any authority. On appreciation of the entire evidence, this Court finds that the finding entered by the trial court is

is correct. On the basis of the above finding, question to be considered is whether the offence committed by the appellant comes under section 58 or section 8 of the the Abkari Act?

6. Section 58 of the Abkari Act reads as follows:-

> "58. For possession of illicit liquor:- Whoever, without lawful authority, has in his possession any quantity of liquor or of any intoxicating drug, knowing the same to have been unlawfully imported, transported or manufactured, or knowing the duty, tax or rental payable under this Act not to have been paid therefor, shall be punishable with imprisonment for a term which, may extend to ten years and with fine which shall not be less than rupees one lakh."

As per subsection (10) of section 3 of the Abkari Act "liquor" includes spirits of wine, arrack, spirits, wine, toddy, beer and all liquid consisting of or containing alcohol. Arrack is defined under sub-section (6A) of section 3 of the Abkari Act thus "any potable liquor other than Toddy, Beer, Spirits of Wine, Wine, Indian made spirit, foreign liquor and any medicinal preparation containing alcohol manufactured according to a formula prescribed in a pharmacopoeia approved by the Government of India or the Government of Kerala, or manufactured according to a formula approved by the Government of Kerala in respect of patent and proprietary preparations or approved as a bona fide medicinal preparation by the Expert Committee appointed

under section 68A of the Act". So, the offence under section 58 is attracted where the prosecution has proved that the possession is coupled with the knowledge that the liquor had been unlawfully imported, transported or manufactured, or knowing that the duty, tax or rental payable under the Act has not been paid therefor. The trial court found that the appellant was found in possession of four litres of illicit arrack on 23-1-2004. Possession of arrack in any form without any authority would only attract under section 8 of the Abkari Act.

Section 8 of the Abkari Act reads as follows:-

> "8(1) Prohibition of manufacture, import, export, transport, transit, possession, storage, sales, etc. of arrack.:- No person shall manufacture, import, export, transport, without permit transit, possess, store, distribute, bottle or sell arrack in any form.
>
> (2) if any person contravenes any provisions of sub-section (1), he shall be punishable with imprisonment for a term which may extend to ten years and with fine which shall not be less than rupees one lakh" .

7. In the above circumstances, this Court is of the view that the conviction and sentence awarded against the appellant under section 58 of the Abkari Act shall be converted to that of under section 8 the Abkari Act. Hence, the appellant is convicted under section 8 (1) read with section 8(2) of the Abkari Act. Considering the fact that the appellant was in possession of a small quantity of arrack, the trial

court took a lenient view in awarding sentence. Hence, this Court is of the view that the sentence awarded by the court below to under go simple imprisonment for two years and to pay fine of Rs.1,00,000/- and in default to undergo simple imprisonment for a further period of six months is sufficient punishment. Ordered accordingly.

8. Therefore, the appeal stands dismissed confirming the findings entered by the trial court and altering the conviction from section 58 of the Abkari Act to section 8(1) read with section 8(2) of the Abkari Act.

K. Thankappan,
Judge.

K. Thankappan,J.

- - - - - - - - - - - - - - - -

Crl.A. No. 156/2007

- - - - - - - - - - - - - - - -

Judgment
11-6-2007